

August 13, 1992

The Honorable Lawrence S. K. Lee
Director
Office of Veteran Services
Department of Defense
State of Hawaii
733 Bishop Street, Suite 1270
Honolulu, Hawaii 96813

Dear Mr. Lee:

Re:Audio Tape Recording of the Commission's
Public Meeting

This is in response to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion regarding the public disclosure of an audio tape recording of a public meeting of the State Commission on Memorials for Veterans of the Korean and Vietnam Conflicts ("Commission").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Office of Veterans Services, State of Hawaii Department of Defense ("OVS"), must make an audio tape recording of a public meeting of the Commission ("audio tape recording") available for public inspection and copying.

BRIEF ANSWER

The audio tape recording of the Commission's meeting is a "government record" because it constitutes "information maintained by an agency in . . . auditory . . . form." Haw. Rev. Stat. . 92F-3 (Supp. 1991). The UIPA expressly requires an

agency to make available for public inspection and copying "[i]nformation contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public." Haw. Rev. Stat. . 92F-12(a)(16) (Supp. 1991) (emphases added). For the reasons explained herein, we find no basis to treat an audio tape recording of the Commission's meeting differently than if the information was "contained in . . . a transcript." See id.

Further, even assuming that the audio tape recording is not made public under section 92F-12(a)(16), Hawaii Revised Statutes, we find that it would not be protected by any UIPA exception, including the exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1991). Specifically, the disclosure of the audio tape recording of the Commission's meeting would not result in the frustration of the Commission's decision-making functions since the Commission must generally conduct its deliberations in meetings that are open to the public. See Haw. Rev. Stat. ch. 92, pt. 1 (1985 and Supp. 1991).

Consequently, in our opinion, the OVS must make the audio tape recording of the Commission's meeting available for public inspection and copying. The OVS cannot fulfill its disclosure obligations by merely disclosing the written minutes of the Commission's meeting. Rather, it must disclose the audio tape recording of the Commission's public meeting upon request so long as the OVS maintains this government record in the physical form requested. See generally OIP Op. Ltr. No. 90-35 at 10-14 (Dec. 17, 1990).

FACTS

In 1988, the State Legislature established the Commission, the functions of which are to "plan and select works of art for memorials to the veterans of the Korean and Vietnam conflicts as well as to select a site for the memorials." Haw. Rev. Stat. . 6E-44 (Supp. 1991). On March 25, 1992, the Commission held a meeting that was open to the public. The meeting was recorded by the Commission on an audio tape for use in preparing the written minutes of this meeting.

According to the OVS, part I of chapter 92, Hawaii Revised Statutes, requires the Commission to maintain and make publicly available written minutes of its public meetings as follows:

.92-9 Minutes. (a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. . . .

(b) The minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5;

Haw. Rev. Stat. . 92-9(a) & (b) (1985). The OVS is currently preparing the written minutes of the Commission's March meeting and will make them available to the public when they are in final form.

The OVS has received requests for public access to the audio tape recording of the Commission's March meeting from State Representative Karen Horita and Hawaii veteran organizations. Consequently, the OVS requested an advisory opinion from the OIP regarding the public's right to inspect and copy the audio tape recording of the Commission's public meeting.

DISCUSSION

Under the UIPA, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. . 92F-11(b) (Supp. 1991). The term "government record" is defined by the UIPA as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. . 92F-3 (Supp. 1991).

According to the OVS, the audio tape recording is maintained only for the purpose of preparing the written minutes required by the open meetings law in part I of chapter 92, Hawaii Revised Statutes. See Haw. Rev. Stat. . 92-9 (1985). Section 92-9, Hawaii Revised Statutes, expressly does not require the Commission to either make or maintain an audio tape recording of its public meetings. Regardless of whether the audio tape recording of the Commission's meeting was required to be made, it is nonetheless a "government record" subject to the UIPA's public access provisions because it constitutes "information maintained by an agency in . . . auditory . . . form." See Haw. Rev. Stat. . 92F-3 (Supp. 1991) (emphasis

added); see also OIP Op. Ltr. No. 91-5 at 6 (April 15, 1991) ("maintain" means "hold, possess, preserve, retain, store, or administratively control").

I. RECORDS EXPRESSLY REQUIRED TO BE MADE PUBLIC

Section 92F-12(a)(16), Hawaii Revised Statutes, states that "[a]ny provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication . . . [i]nformation contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public," such as the Commission's public meeting. Haw. Rev. Stat. . 92F-12(a)(16) (Supp. 1991) (emphases added). As to the categories of records listed in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history explains that "the [UIPA's] exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw. S.J. 689, 690 (1988).

In describing the information concerning public proceedings that must be publicly disclosed in section 92F-12(a)(16), Hawaii Revised Statutes, the Legislature listed records that are usually in written form. For example, the term "transcript" is defined in Webster's Dictionary as, among other things, a "typewritten copy of dictated or recorded material." Webster's Ninth New Collegiate Dictionary 1252 (Merriam-Webster 1988) (emphases added). Since a "transcript" is a written "copy of . . . recorded material," we believe that the audio tape recording of the Commission's meeting provides the same information as would be contained in a "transcript" except in auditory form.

After reviewing the facts, and the policies underlying the UIPA, we find no reason to treat a tape recording of a public meeting of an agency differently from a "transcript" of such a meeting. Haw. Rev. Stat. . 92F-12(a)(16) (Supp. 1991). Given the UIPA's broad definition of the term "government record," we do not believe that the Legislature would have intended section 92F-12(a)(16), Hawaii Revised Statutes, to result only in the disclosure of written or paper records of public proceedings. See OIP Op. Ltr. No. 90-35 (Dec. 17, 1990) (electronic mailing list of water use declarants). In OIP Opinion Letter No. 90-35, the OIP opined that so long as an agency maintains public information in the form requested by the public under the UIPA, the agency must generally provide a copy of that government record in the format requested, unless doing so might significantly risk damage, loss, or destruction of the original

record. Id. at 13. We reached this conclusion because the UIPA's definition of the term "government record" expressly encompasses information maintained by an agency in all physical forms, not just written or paper forms. See Haw. Rev. Stat. . 92F-3 (Supp. 1991).

Thus, we believe that the audio tape recording of the Commission's meeting must be made available for public inspection and copying under section 92F-12(a)(16), Hawaii Revised Statutes. In our opinion, this conclusion best effectuates the statutory requirements and legislative purposes underlying the UIPA. See OIP Op. Ltr. No. 90-35 (Dec. 17, 1990).

II. "FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION" EXCEPTION

Even if we were to assume that section 92F-12(a)(16), Hawaii Revised Statutes, does not apply to the audio tape recording of the Commission's meeting, we find that none of the UIPA exceptions to required disclosure applies to the audio tape recording of the Commission's meeting. In particular, the audio tape recording would not be protected under the UIPA exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1991). Specifically, we do not believe that the disclosure of the tape recording would result in the frustration of the Commission's deliberative functions. See Veltri v. Charleston Urban Renewal Authority, 363 S.E.2d 746 (W. Va. 1987).

In Veltri, the West Virginia Supreme Court of Appeals rejected the argument that a tape recording of an agency's public meeting, which was made and used to make corrections to the meeting minutes, was an "internal memorandum" exempt from public disclosure. Consequently, the court held that the tape recording must be disclosed upon request. The court reasoned as follows:

Although the Charleston Urban Renewal Authority indicates that the tape in question was made for the purpose of providing the secretary who took the minutes of the open meeting with an opportunity to check the correctness of those minutes, the tape was of a public, open meeting. By virtue of the character of that meeting the exchange of ideas which occurred at that meeting was inherently subject to public scrutiny. . . . In effect, this Court cannot see how the suppression of the tape in any way could have

altered the exchange of ideas at the meeting or could alter such an exchange in the future.

363 S.E.2d at 748 (emphasis added).

As in the Veltri case, although the audio tape recording of the Commission's meeting will be used only for the limited purpose of preparing written minutes of the meeting, in our opinion, the tape recording does not constitute an intra-agency record that is "predecisional" and "deliberative," the disclosure of which would frustrate agency decision-making. Cf. OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) and OIP Op. Ltr. No. 91-16 (draft documents protected by the "frustration of a legitimate government function" exception).

Furthermore, we note that chapter 92, Hawaii Revised Statutes, provides that "[a]ll or any part of a meeting of a board may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction." Haw. Rev. Stat. . 92-9(c) (1985). Since persons attending the Commission meeting could have made their own audio tape recordings of the meeting and have immediate access to the information contained therein, we do not believe that the disclosure of the same information from the OVS' audio tape recording before the OVS' preparation of the meeting minutes would frustrate any of its agency functions.

Thus, we find that the audio tape recording of the Commission's meeting is not protected by a UIPA exception. Consequently, the audio tape recording must be made available for public inspection and copying so long as the OVS maintains this record.¹ See also Brent v. Paquette, 567 A.2d 976 (N.H. 1990)

¹The disposal of government records is generally governed by chapter 94, Hawaii Revised Statutes, entitled "Public Archives; Disposal of Records." Because the retention and destruction of government records are outside the scope of the UIPA, questions on these matters should be directed to the Archives Division, Department of Accounting and General Services. For purposes of complying with the UIPA, we believe that when a government agency receives a request for the disclosure of a record that is required to be made available for public inspection, it would be improper for the agency to avoid its disclosure obligations by intentionally or knowingly destroying the requested record.

(tape recordings of school board meetings are subject to inspection while they are maintained during the preparation of written minutes).

Because we find that information about the Commission's meeting is publicly disclosable regardless of whether it is in a written or auditory format, the OVS cannot choose to limit the format in which this information is to be disclosed. Specifically, in response to a request for the disclosure of the audio tape recording of the Commission's meeting, the OVS cannot fulfill its disclosure obligations under the UIPA by merely allowing public inspection and copying of the written minutes of the Commission's meeting when finalized. See OIP Op. Ltr. No. 90-35 (Dec. 17, 1990) (as long as an agency maintains a record in the form requested, the agency must generally make the record available in that form).

CONCLUSION

The audio tape recording of the Commission's meeting is a "government record" because it is information maintained by the OVS in some physical form. The OVS must make this government record available for public inspection and copying under the UIPA because it is not protected by any UIPA exception to disclosure. Also, the UIPA expressly requires that an agency make available for public inspection and copying "[i]nformation contained in or compiled from a transcript . . . of a proceeding open to the public." Haw. Rev. Stat. . 92F-12(a)(16) (Supp. 1991) (emphases added). So long as the OVS maintains the audio tape recording of the Commission's meeting, the OVS must allow public access to it upon request even though the information contained therein will be made publicly available in the written minutes of the Commission's meeting.

Very truly yours,

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Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

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